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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/919,961	08/02/2001	Thomas M. Collins	2280.2770	4327
5514	7590	07/13/2005	EXAMINER	
FITZPATRICK CELLA HARPER & SCINTO 30 ROCKEFELLER PLAZA NEW YORK, NY 10112			MADSEN, ROBERT A	
			ART UNIT	PAPER NUMBER

1761

DATE MAILED: 07/13/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

09/919,961

Applicant(s)

COLLINS ET AL.

Examiner

Robert Madsen

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--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 20 June 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The reply was filed after the date of filing a Notice of Appeal, but prior to the date of filing an appeal brief. The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☐ Applicant's reply has overcome the following rejection(s): _____.

6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: None.

Claim(s) objected to: None.

Claim(s) rejected: 1 and 5-16.

Claim(s) withdrawn from consideration: None.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Attached Office Action.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____

13. ☐ Other: _____.

DETAILED ACTION

Response to Arguments

1. Applicants state that Laval teaches a device for placing candy pellets on cereal granules or dough, not chocolate tablets with recesses to form a pattern. However, as discussed in the Office Action mailed April 5, 2005 (Paragraphs 7- 10), Laval do teach the general concept of placing candy pellets on an edible substrate in a desired pattern form by placing the candy pellets *on* recesses (i.e. item 135 of Figure 3 is clearly a recesses intended to receive the candy pellet), whereas Nishi is relied on as evidence of the conventionality of decorating chocolate edible substrates.
2. Applicants assert that the pricking device does not create a *recess*, but a perforation. The Examiner maintains, as clearly illustrated by Figure 3 of Laval, the perforation, item 135, forms a *recess* in the surface of the substrate.
3. Applicants further argue that the "perforation" of Laval does not meet the claim limitation of "recesses for receiving" or "recesses form a pattern". The Examiner maintains, as discussed in the Office Action mailed April 5, 2005 (paragraphs 7-8), the perforation, which *is* a recess as discussed above in paragraph 2, does *receive* the pellets, as clearly illustrated by Figure 3, and that the pellets may be received in a desired pattern (e.g. as illustrated in Figure 7 items 270).
4. Applicants contend the secondary references do not provide motivation to alter Laval. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by

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combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) And *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

5. With respect to Boyce in particular, Applicants contend that Boyce makes no suggestion of carrier bars having various pocket placement to effect the arrangement of pellet shaped candies. Claim 1 recites " a plurality of carrier bars and wherein at least on group of said plurality of carrier bars has pockets for receiving" and "said grouping of carrier bars are arranged to form a predetermined defined pattern". The primary reference, Laval, teaches aligning the pockets of a drum conveyor for receiving the pellet shaped candies to form a predetermined defined pattern. Boyce et al. teach the conventional drum conveyor used for transferring pellets from a hopper to a substrate conveyor in a desired pattern, as taught by Laval, does not allow for quick changeovers to accommodate various pellet orientation and sizes. Boyce et al. teach that the conventional drum conveyor, such as the one used by Laval, used in a process to transfer pellets from the conveyor to a substrate, in the case of Boyce et al. the substrate is an endless conveyor, does not allow for quick changeovers from various orientations or sizes. Boyce et al. teaches including carrier bars with the pockets on a drum conveyor will allow for quicker changeovers to *various* orientation and sizes. See paragraph 11 of the Office Action mailed April 5, 2005 and the rejection of March 31, 2004. It is noted that Boyce et al. teach the pocket arrangement of the bars allow

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the pellets of the modified drum conveyor to fall into the *aligned* concavities of the substrate intended to receive the pellets (Column 6, lines 36-45), which as seen in Figure 2, for example, is a predetermined defined pattern (i.e. two parallel rows). Thus, Boyce et al. do indeed teach the pockets of the carrier bars on the drum are intended be arranged to provide a desired pattern on a substrate, just as Laval teaches arranging the pockets of the drum to provide a desired pattern on an edible substrate.

6. With respect to Nishi, Applicant's assert that Nishi is deficient. The primary reference, Laval, teaches the general concept of decorating an edible substrate, either firm or soft material, with candy pellets, and using an edible adhesive in combination with a recess (i.e. the perforation) with a firm material. Nishi teaches a different firm edible substrate (i.e. solid chocolate) decorated with candy pieces and an edible adhesive appropriate for securing the candy pieces (i.e. a chocolate nub). The Examiner maintains as discussed in paragraph 12 of the Office Action mailed April 5, 2005 and the rejection set forth in the Office Action of March 31, 2004: one would have been substituting one edible substrate for another for the same purpose (i.e. adhesively securing candy pieces in a decorative pattern).

7. Regarding Ackley, Ackley is relied on for teaching "a ramp type conveyor" as recited in claim 8 and suction elements as recited in claim 10. As discussed in paragraph 13 of the Office Action mailed April 5, 2005 and the rejection set forth in the Office Action of March 31, 2004, Ackley is relied on for teaching drum conveyors, as taught by Laval, and ramp type conveyors are art recognized conveying equivalents for handling pellets, and Ackley teaches ramp conveyors use suction. None of the claims

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for which Ackley is applied recite any type of printing requirements as discussed by Applicants. The fact that applicant has recognized another advantage for ramp conveyors which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious.

See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985).

8. Regarding Morishita, claim 16 recites, " further comprising the step of printing an image on said pellet shaped candy pieces located in said pockets". The claim does not require any particular orientation of the pellet, as suggested by Applicant, just that the pellet includes a printed image. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). As discussed in paragraph 13 of the Office Action mailed April 5, 2005 and the rejection set forth in the Office Action of March 31, 2004, Morishita, as well as Nishi, the pre-decorated edible items applied to a substrate.


Conclusion

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

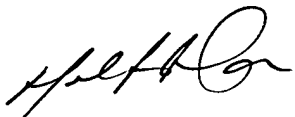
10. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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11. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen 
Examiner
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